IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 18TH SEPTEMBER 2007 / 27TH BHADRA 1929

RSA.No. 716 of 2007()

AS.68/2003 of ADDL.DISTRICT COURT & SESSIONS COURT, PATHANAMTHITTA
OS.116/1998 of M.C.,PATHANAMTHITTA

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: APPELLANT/APPELLANT/2ND DEFENDANT

P.V.YOHANNAN, S/O.LATE VARGHESE,
PARACKATTU NEDUMPURATHU, KUMBAZHA MURI,
PATHANAMTHITTA, REPRESENTED BY POWER OF ATTORNEY
THOMAS JOHN, S/O.P.V.YOHANNAN, NEDUMPURATHU
HOUSE, KUMBAZHA.

BY ADV. SRI.S.SREEKUMAR

RESPONDENTS: RESPONDENTS/PLAINTIFFS AND DEFENDANTS 1 & 3 TO 6

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1. P.V.ABRAHAM, S/O.LATE VARGHESE, AGED 70 YEARS, NEDUMPURATHU, HOUSE NO.150 N.S.P.NAGAR, PATTOM, KESAVADASAPURAM, THIRUVANANTHAPURAM.

2. P.V.SAMUEL, S/O.LATE VARGHESE, AGED 73 YEARS, KUMBAZHAKUZHI, NEDUMPURATHU, KUMBAZHA MURI, PATHANAMTHITTA VILLAGE.

3. P.V.VARKEY, S/O.LATE VARGHESE, AGED 63 YEARS, NEDUMPURATHU, MYLAPRA VILLAGE, PATHANAMTHITTA.

4. P.V.JOHN, S/O.LATE VARGHESE, AGED 60 YEARS, NEDUMPURATHU NEW HOUSE, NEDUMPURATHU, KUMBAZHA MURI, PATHANAMTHITTA VILLAGE.

5. MARYKUTTY JOHN, W/O.V.S.JOHN, AGED 52 YEARS, NEDIYAMANNIL, VALLICODE VILLAGE, V.KOTTAYAM, PATHANAMTHITTA.

6. ANNAMMA M.PANICKER, W/O.MATHEW PANICKER,
AGED 45 YEARS, KALLARACKAL,
HOSPITAL JUNCTION, KUNDARA, KOLLAM.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 18/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.1502/2007 IN R.S.A.NO.716/2007

18.9.2007 DISMISSED Sd/-M.Sasidharan Nambiar
Judge

/true copy/

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 716 OF 2007

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Dated this the 18th day of September, 2007

JUDGMENT

Second defendant in O.S.116/1998 on the file of Munsiff Court, Pathanamthitta is the appellant. First respondent is the plaintiff and other respondents other defendants in the suit. First respondent instituted the suit seeking a decree for partition and separation of his 1/7 share. Plaint schedule property originally admittedly belonged to deceased Varghese. The fact that on the death of Varghese, his rights devolved on appellant and respondents are not disputed. So also the quantum of the share due to them. Appellant in his written statement contended that plaint schedule properties have been in his exclusive possession from the date of death of deceased Varghese and even if other children of Varghese are entitled to a share, it is lost by ouster and adverse possession. It was contended that plaint schedule properties are not

available for partition and appellant was the only earning member of the family and he had conducted various business and earned money and educated his brothers who later got lucrative post and by ouster and adverse possession the rights of other respondents is lost.

2. Learned Munsiff on the evidence of PW1, Dws.1 and 2 and Exts.A1 to A3 and Exts.B1 to B34(n) and Exts.C1 to C1(b) found that plaint schedule properties are available for partition and possession of the appellant is only as one of the co-owners and it is not adversed to the other co-owners and therefore directed division of the properties into 7 equal shares and allotment of one such share each. Appellant challenged the decree and judgment before District Court,Pathanamthitta in A.S.68/2003. Learned District Judge on reappreciation of evidence

confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that inspite of specific plea in the written statement that the rights of other co-owners is lost by ouster and adverse possession, no separate issue was framed by the trial court and inspite of evidence let in, that aspect was not considered by the courts below and therefore the preliminary decree granted by courts below is not sustainable. Learned counsel also argued that records were produced to prove exclusive possession of the appellant from 1981 and the suit was filed only in 1998 and evidence was not properly appreciated by courts below and if an issue on the question

whether the rights of the other co-owners was lost by ouster and adverse possession was framed evidence would have been considered by the courts below and in the absence of proper consideration by the courts below, the decree and judgment are to be set aside and that question is directed to be reconsidered.

5. It is true that an issue on the question whether rights of the plaintiff and other defendants who are co-owners is lost by ouster and adverse possession was not raised. But learned Munsiff while considering issue No.3 has considered this question. The trial court found that though appellant had produced tax receipts and evidence was let in to prove that he has been residing in the property, his possession could only be as one of the co-owners and that possession could only be for and on behalf of the other co-owners also

and therefore rights of the other co-owners is not lost by ouster and adverse possession. First appellate court has also considered this aspect in paragraph 16 of the judgment. Relying on the decision of this court in Kunjipennu and others v. Chandrika and others (2003(2) KLJ 754) first appellate court found that possession of one co-owner could only be for and on behalf of other co-owners also and in the absence of evidence to prove open assertion of title coupled with exclusive possession and enjoyment by the appellant the claim that right of other co-owners is ousted is unsustainable. It was found that there is no evidence to prove that there was any open assertion of title or ouster of the non-possessing co-owners and therefore the plea is not sustainable.

6. Eventhough records were produced to prove that appellant was staying in the residential house

and was paying tax for the property, there is no evidence to prove that the rights of other non-possessing co-owners were ousted to their knowledge. There is also no evidence to prove that there was open assertion of hostile title to the knowledge of the non-possessing co-owners. In law possession of one co-owners could only be for and on behalf of the other co-owners and rights of the non possessing owners will be lost only if there is ouster. In the absence of evidence to prove ouster finding of the courts below that all the co-owners are entitled to get their share separated is perfectly correct. No substantial question of law is involved in the appeal. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006